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No. 10-966

Supreme Court, U.S.
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In The

Supreme Court of the United States

WILLIAM ROGER CLEMENS,

Petitioner,

v.

BRIAN MCNAMEE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Fifth Circuit err in affirming dismissal of petitioner's defamation claims for lack of personal jurisdiction based on a conclusion that a plaintiff's damage in the forum state cannot alone support specific jurisdiction when the statements at issue were made elsewhere and lacked any connection with the forum state in "content or context"?

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STATEMENT OF THE CASE

A. INTRODUCTION

Petitioner seeks review of the Fifth Circuit's factbound decision in an attempt to force a New York citizen to go to Texas to defend against claims based on statements he made in New York, about activities in New York and Canada. But the decisions of the court of appeals and district court, finding due process does not allow Texas courts to exercise jurisdiction simply because petitioner lives there, reflected a straightforward application of well-established case law. As the court of appeals explained, the sole question before it was, "whether allegedly defamatory statements made elsewhere but which caused damage to the plaintiff in the forum state are sufficient to confer personal jurisdiction over the defendant when the content and context of the statements lack any connection with the forum state." App. 1a-2a. The answer to this question under the law of this Court, and of each circuit, is the same: No. Petitioner does not suggest otherwise as to this dispositive question – but instead discusses at length a purported "circuit split" on a separate and independent issue not even addressed by the court of appeals majority.

B. FACTUAL BACKGROUND

The facts of this case are quite simple. In 2007, respondent Brian McNamee, a New York resident and personal trainer, was approached by federal authorities in connection with their investigation of BALCO,

a California laboratory allegedly involved in the development and sale of performance-enhancing drugs to athletes. App. 3a. In exchange for cooperation with the investigation, McNamee was given use immunity by the United States Attorney's Office for the Northern District of California. *Id.* Over a two-day interview, McNamee told investigators he had injected his former client, professional baseball player and Texas resident petitioner Roger Clemens, with performance-enhancing drugs in 1998, 2000, and 2001, in Toronto and New York. *Id.* The same federal authorities then required McNamee, as part of his immunity agreement, to cooperate with an investigation being conducted by former U.S. Senator George Mitchell, under the auspices of Major League Baseball, in response to a congressional inquiry. *Id.* These authorities arranged for McNamee to meet with Mitchell in New York, and participated in the meeting between Mitchell and McNamee. *Id.* McNamee repeated the same statements that he had made to the federal investigators, and those statements were included in a report issued on December 12, 2007, entitled *Report to the Commissioner of Baseball of an Independent Investigation Into the Illegal Use of Steroids and Other Performance Enhancing Substances By Players In Major League Baseball* ("the Mitchell Report"). *Id.* Mr. McNamee also later repeated these statements in an interview with John Heyman, a reporter for the internet site SI.com, conducted at his New York home, which were incorporated into an article posted on the site on January 7, 2008. *Id.* at 4a.

C. THE DISTRICT COURT'S RULING

In January 2008, Clemens initiated this action for defamation against McNamee in Texas state court, claiming the statements were false. App. at 46a. McNamee removed the action to the District Court for the Southern District of Texas, and, *inter alia*, moved to dismiss on the grounds that (1) the court lacked personal jurisdiction over McNamee, and (2) that McNamee was entitled to immunity for statements made to the Mitchell Commission.

The district court granted McNamee's motion in both respects.[1] As to the jurisdictional challenge, the court held that, in order to satisfy due process,[2] Clemens was required to show: "(1) McNamee purposefully availed himself of the benefits and protections of Texas law, thereby establishing 'minimum contacts' with Texas such that McNamee could reasonably have anticipated being haled into court there; and (2) under the circumstances, the exercise of personal jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" App. at

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[1] Clemens had initially brought claims based on conversations between McNamee and baseball player Andy Pettitte in 1999 or 2000 and 2003 or 2004. In its order, the district court granted Clemens leave to amend his claim regarding the statements to Pettitte. Clemens did not do so and rather stipulated to dismissal of that claim with prejudice, those claims were voluntarily dismissed with prejudice in October 2009.

[2] The court and parties agreed that the Texas long-arm statute is coterminous with the Due Process Clause of the Fourteenth Amendment. App. 47a.

47(a) (citing *Command-Aire Corp. v. Ontario Mechanical Sales and Service Inc.*, 963 F.2d 90, 94 (5th Cir. 1992)). Applying the "effects test" set out by this Court in *Calder v. Jones*, 465 U.S. 783 (1984), and elaborated upon by the Fifth Circuit in *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005) and *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002), the court rejected Clemens's arguments that jurisdiction was appropriate. App. at 49a-53a. The court noted that, though "McNamee knew that Clemens would feel the brunt of the harm from his statements in Texas," it lacked jurisdiction, "because the focal point of McNamee's publication was not Texas." *Id.* at 52a. The court based this conclusion on multiple facts: "McNamee's statements to Mitchell and Heyman did not mention Texas, they were not drawn from Texas sources, and, if anything, they was [*sic*] just as likely to attract the interest of New York Yankees fans as that of Houston Astros fans. The geographic focus of McNamee's statements was undoubtedly New York." *Id.* at 53a.

The court also concluded, in the alternative, "that McNamee's statements to Mitchell should be treated with immunity." App. at 59a. Upon reviewing supplemental material, including declarations of an Assistant United States Attorney and McNamee's counsel, the court determined that summary judgment was appropriate on this issue, applying Texas law, which provides that "statements made to government agencies as part of legislative, judicial, or quasi-judicial proceedings are entitled to absolute

immunity so long as they are made as part of an ongoing proceeding, they are not unsolicited, and they are made to an agency whose findings need not be approved or ratified by another agency." App. at 60a (citing *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 994 (5th Cir. 1999)). The court held this standard was met and that "McNamee was compelled to make his statements to Mitchell as part of a judicial proceeding," given that McNamee only spoke to the Mitchell Commission as "part of his co-operation with the [federal criminal] investigation in order to maintain his witness status," and the meeting was facilitated by the United States Attorney's Office. *Id.* at 61a-63a.[3]

D. THE FIFTH CIRCUIT'S RULING

The court of appeals affirmed. *Id.* at 1a-10a. The court considered the question before it to be a narrow one: "whether allegedly defamatory statements made elsewhere but which caused damage to the plaintiff in the forum state are sufficient to confer personal jurisdiction over the defendant when the content and context of the statements lack any connection with the forum state," and answered in the negative. *Id.* at 1a-2a.

The court held that, in order to establish specific personal jurisdiction over McNamee, Clemens needed

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[3] Clemens later filed a motion for reconsideration on this second ground, which was denied. App. at 29a-41a.

to make a prima facie showing that McNamee *both* "purposefully directed activities in the forum . . . such that he could reasonably anticipate being haled into court in the forum state" *and* that there was "a sufficient nexus between the non-resident's contacts with the forum and the cause of action." *Id.* at 6a (citing *Burger King v. Rudzewicz*, 471 U.S. 462, 472, 474 (1985) and *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 n. 8 (1984)).

The court only considered the first of these two requirements, and concluded jurisdiction was lacking, since "the relevant contacts from which Clemens's cause of action arises are the allegedly defamatory remarks about Clemens which McNamee made to the Mitchell Commission and John Heyman of SI.com," and those remarks did not constitute "purposeful availment" of the forum of Texas. *Id.* at 6a-9a. In reaching this conclusion, the court analyzed *Calder*, *Fielding*, and *Revell*, and noted it "read *Calder* as requiring the plaintiff seeking to assert specific personal jurisdiction over a defendant in a defamation case to show '(1) the subject matter of and (2) the sources relied upon for the article were in the forum state.'" *Id.* at 9a.

Rejecting Clemens's arguments, the court found this standard was not met simply by the "harm he suffered in Texas and [ ] McNamee's knowledge of the likelihood of such damage in the forum." *Id.* In explaining its conclusion that Clemens had "not made a prima facie showing that McNamee made statements in which Texas was the focal point," the court pointed

out that "the statements did not concern activity in Texas; nor were they made in Texas or directed to Texas residents any more than residents of any state." *Id.*

Because of its conclusion on the issue of purposeful availment, the court did not address the "arising out of or related to" requirement, nor did it address the alternative holding regarding immunity.

Judge Haynes dissented, contending that *Calder* did not need to be applied to the case – an argument not made by Clemens – because McNamee had years earlier trained Clemens in Texas, App. at 13a-20a, and that, even if it did, Clemens's residence in Texas was in and of itself sufficient to meet the *Calder* standard, *id.* at 21a-25a. Judge Haynes did not address the immunity issue. *Id.* at 11a, n. 1.

Clemens petitioned for rehearing *en banc*, which the court of appeals denied, with "no member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc." *Id.* at 72a.

REASONS FOR DENYING THE PETITION

The Fifth Circuit's factbound decision, affirming the dismissal of the action for lack of personal jurisdiction, does not warrant further review. It does not conflict with the decision of any other federal court of appeals or any precedent of this Court. In fact, the

issue that Petitioner focuses on in seeking review was not even addressed by the court of appeals majority, as the issue it did reach is independently dispositive. Moreover, there was an alternate state law ground for dismissal, as determined by the district court, not reached by the court of appeals.

I. THE FIFTH CIRCUIT'S CONCLUSION THAT DAMAGE TO THE PLAINTIFF IN THE FORUM STATE IS INSUFFICIENT TO CONFER PERSONAL JURISDICTION DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS OR OF THIS COURT

As noted above, the court of appeals considered there to be only one, dispositive question before it: "whether allegedly defamatory statements made elsewhere but which caused damage to the plaintiff in the forum state are sufficient to confer personal jurisdiction over the defendant when the content and context of the statements lack any connection with the forum state." App. at 1a-2a. In answering this question in the negative, the court of appeals applied well-established case law to hold that jurisdiction was improper for one reason – that McNamee's statements did not constitute "purposeful availment" of a Texas forum under the "effects test" of *Calder v. Jones*, 465 U.S. 783 (1984).

The Court of Appeals's decision faithfully applied a long line of Fifth Circuit precedent which makes clear that a plaintiff's mere "suffering of harm" in the

forum state is insufficient evidence of purposeful availment. *Revell v. Lidov*, 317 F.3d 467 (5th Cir. 2002); *Panda Brandywine Corp. v. Potomac Elec. Power Co.*, 253 F.3d 865, 867 (5th Cir. 2001) (per curiam); *Fielding v. Hubert Burda Media, Inc.*, 415 F.3d 419 (5th Cir. 2005). This case law is not only consistent with *Calder v. Jones*, 465 U.S. 783 (1984), but also in accordance with the law of every circuit that has considered the issue, each of which has held that the effects upon a plaintiff within the forum state – foreseeable or not – are alone insufficient to support personal jurisdiction, absent any other showing of targeting a forum.[4] *See, e.g.*, *Johnson v. Arden*, 614 F.3d 785, 797 (8th Cir. 2010); *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008) (abrogated on other grounds by *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010)); *Marten v. Godwin*, 499 F.3d 290, 297-98 (3d Cir. 2007); *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544, 552

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[4] Notably, the Fifth Circuit case law the court of appeals relied on here has been expressly embraced by a number of its sister circuits. *See, e.g., Shrader v. Biddinger*, 633 F.3d 1235, 1241, 1244 (citing *Revell*) (10th Cir. 2011); *Cadle Co. v. Schlichtmann*, 123 F. App'x 675, 679-80 (6th Cir. 2005) (citing *Revell*). *Revell* itself also relied on precedent from other circuits that have held that mere knowledge of plaintiff's residence in the forum state is insufficient to constitute purposeful availment. 317 F.3d at 473-75 (looking to and approving of *Reynolds v. Int'l Amateur Athletic Federation*, 23 F.3d 1110, 1120 (6th Cir. 1994), *Young v. New Haven Advocate*, 315 F.3d 256, 261-62 (4th Cir. 2002), and *Remick v. Manfredy*, 238 F.3d 248, 257-59 (3d Cir. 2001)).

(6th Cir. 2007); *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1158 (9th Cir. 2006).

One such case, *Reynolds v. International Amateur Athletic Federation*, 23 F.3d 1110 (6th Cir. 1994), involved remarkably similar facts. There, a professional athlete who lived in Ohio sued a London-based international athletic federation for defamation based upon a press release it had issued in London stating that a urine sample taken from him in Monaco had tested positive for drugs in a Paris laboratory. 23 F.3d at 1112-14. Though the federation knew its statement would likely have effects in Ohio, the Sixth Circuit held plaintiff's claim of personal jurisdiction failed for a lack of "purposeful availment." *Id.* at 1116-20. The court distinguished *Calder* on many of the same bases as the court of appeals did here:

> First, the press release concerned Reynolds' activities in Monaco, not Ohio. Second, the source of the controversial report was the drug sample taken in Monaco and the laboratory testing in France. Third, Reynolds is an international athlete whose professional reputation is not centered in Ohio. Fourth, the defendant itself did not publish or circulate the report in Ohio; Ohio periodicals disseminated the report. Fifth, Ohio was not the "focal point" of the press release. The fact that the IAAF could foresee that the report would be circulated and have an effect in

> Ohio is not, in itself, enough to create personal jurisdiction.

Id. at 1120. Far short of a disagreement between circuits, there is absolute harmony.

Petitioner points to case law from the Seventh and Tenth Circuits as evidence of a circuit split on this issue. Pet. at 25-26. But this is simply incorrect. Just weeks ago, the Tenth Circuit reiterated its holding that, it has taken a "more restrictive approach" to applying the "expressly aimed" requirement of *Calder*, and thus, to support the exercise of jurisdiction, "*the forum state itself must be the focal point of the tort.*" *Shrader v. Biddinger*, 633 F.3d 1235, 1244 (10th Cir. 2011) (emphasis in original) (citing *Dudnikov v. Chalk & Vermilion Fine Arts, Inc.*, 514 F.3d 1063, 1074 n.9 (10th Cir. 2008)). Thus, where the content of an internet forum message – alleged to defame an Oklahoma resident – was "geographically neutral," and the facts suggested that the post was targeted "at a nation-wide or world-wide audience," the Tenth Circuit held due process did not allow the exercise of personal jurisdiction.

Likewise, the Seventh Circuit has recently reaffirmed that it has "rejected the contention that *Calder* meant 'any plaintiff may hale any defendant into court in the plaintiff's home state, where the defendant has no contacts, merely by asserting that the defendant has committed an intentional tort against the plaintiff.'" *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston*

Metroplex, P.A., 623 F.3d 440, 445 (7th Cir. 2010). *See also uBID, Inc. v. GoDaddy Group, Inc.*, 623 F.3d 421, 427 n.1 (7th Cir. 2010) ("*Calder* can be read as authorizing personal jurisdiction in the home state of the victim of almost any alleged intentional tort, but it need not and should not be read quite so broadly.").

Petitioner argues that other courts of appeals have, on other factual allegations, concluded that *Calder can* be satisfied upon a plaintiff's showing of facts aside from a defamatory statement's reference to the plaintiff's forum activities or that the statement is drawn from forum sources. Pet. at 26. Even if this is so, in this case this is a distinction without meaning. The court of appeals here did not say that Clemens could *only* satisfy *Calder* by such a showing. But here there were *no* facts other than the plaintiff's residence that could demonstrate purposeful availment or "express aiming."[5] In *Gordy v. Daily News, L.P.*, 95 F.3d 829, 831 (9th Cir. 1996), for example, the court concluded California had jurisdiction where an alleged defamatory statement was contained in a newspaper that the defendant itself circulated in California, and the article in question relied on calls to California sources. And in *Burt v. Board of Regents of University of Nebraska*, 757 F.2d 242 (10th Cir. 1985), the court found jurisdiction in Colorado over a suit based upon letters a defendant

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[5] Nor has Clemens suggested any in his petition. *See* Pet. at 22-28 (focusing on whether the allegedly defamatory statements themselves constituted "express aiming").

wrote and mailed specifically to Colorado hospitals. These cases are easily distinguishable from the case here on their facts, and in no way demonstrate a circuit split, nor do they suggest that *Calder* can ever be satisfied solely by a plaintiff's residence in a forum state.

II. THIS IS NOT THE APPROPRIATE CASE TO SETTLE THE ISSUE OF THE CONNECTION NECESSARY FOR CLAIMS TO "ARISE OUT OF OR RELATE TO" CONTACTS IN ORDER TO SUPPORT SPECIFIC PERSONAL JURISDICTION

Clemens spends the majority of his petition arguing that there is a decades-old circuit split over the standard to use to determine whether given claims "arise out of or relate to" contacts with a forum, and this Court should thus step in to set forth one standard. Pet. 9-20. But the court in this case did not address this issue *at all* and ruled on entirely independent and adequate grounds. Moreover, Clemens did not raise this issue in the Court below. Thus, this case is not an appropriate vehicle for the Court to address a split posed by other cases. As this Court has repeatedly noted, "we are a court of review, not of first view." *Skinner v. Switzer*, 131 S. Ct. 1289, 1300 (2011) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005)). *See also Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n. 4 (2002) (refusing to consider argument not raised below as waived); *Bragdon v. Abbott*, 524 U.S. 624,

638 (1998) ("It is our practice to decide cases on the grounds raised and considered in the Court of Appeals. . . ."); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 164 (1975) (noting policy of declining to consider a claim without lower court opinion on the same issue). If the issue is as important and frequently-recurring as petitioner insists, that is all the more reason for the Court to wait for a case unlike this one where the issue is actually decided below and where it would affect the outcome.

Additionally, even though the courts of appeals have formulated different standards for determining whether given claims "arise out of or relate to" forum contacts, under none of those standards would McNamee's prior isolated visits to train Clemens in Texas be deemed sufficiently related to Clemens' claims in this action to support a finding of personal jurisdiction.

A. The Court of Appeals Did Not Reach the Question and Ruled on Alternate, Independently Sufficient Grounds

Petitioner tries to obscure the fact that he seeks review of a question not addressed by the majority by focusing almost entirely on the dissent, Pet. at 21-22, and selectively quoting and emphasizing one sentence from the majority opinion, from a passage where the Court used the word "arise" when addressing the "purposeful availment" requirement, *not* the "arise out of or relate to" issue. Pet. at 21, citing App. 6a-7a.

As noted above, the court of appeals held that a plaintiff must make a prima facie case that the defendant "purposefully directed activities in the forum . . . such that he could reasonably anticipate being haled into court in the forum state" *and* that there was "a sufficient nexus between the non-resident's contacts with the forum and the cause of action." *Id.* at 6a (citing *Burger King*, 471 U.S. at 472, 474 and *Helicopteros Nacionales de Colombia*, 466 U.S. at 414 n. 8). This two-pronged requirement is compelled by the text of *Burger King* itself, where this Court held that due process "is satisfied if the defendant has 'purposefully directed' his activities at residents of the forum, *and* the litigation results from alleged injuries that 'arise out of or relate to' those activities." 471 U.S. at 472-73 (emphasis added, citations omitted). The Fifth Circuit's conclusion that *both* of these elements must be met is in accordance with the law of every other circuit. *See, e.g.*, *Adams v. Adams*, 601 F.3d 1, 5 (1st Cir. 2010); *In re Terrorist Attacks*, 538 F.3d at 93 (2d Cir. 2008); *O'Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir. 2007); *Consulting Engineers Corp. v. Geometric Ltd.*, 561 F.3d 273, 278 (4th Cir. 2009); *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 904 (6th Cir. 2006); *Mobile Anesthesiologists Chicago, LLC v. Anesthesia Assocs. of Houston Metroplex, P.A.*, 623 F.3d 440, 444 (7th Cir. 2010); *Johnson v. Arden*, 614 F.3d 785, 794-95 (8th Cir. 2010); *King v. Am. Fam. Mut. Ins. Co.*, 632 F.3d 570, 579-80 (9th Cir. 2011); *Shrader*, 633 F.3d at 1239 (10th Cir. 2011); *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922 (11th Cir. 2007); *Mwani v. bin*

Laden, 417 F.3d 1, 12 (D.C. Cir. 2005); *Nuance Commc'ns, Inc. v. Abbyy Software House*, 626 F.3d 1222, 1231 (Fed. Cir. 2010).

The court of appeals here – appropriately – did not reach the second prong, which petitioner focuses on, and thus it cannot be said that the opinion below implicates a circuit split on this second prong. Thus, if a defendant has not purposefully directed activities in the forum, a court need not consider whether the claim arises out of or relates to forum activities.

B. Applying Any of the Tests in Use By Any Circuit, McNamee's Earlier Visits to Texas Were Not Sufficiently Related to Clemens's Claims

Even if the court of appeals *had* considered the issue of the extent to which petitioner's claims arose out of or related to McNamee's limited Texas contacts, it would not have mattered which of the three tests employed by the courts of appeals was used, as under each test the result would have been the same: the contacts with Texas were not remotely connected to Petitioner's claims.[6]

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[6] Petitioner, in the interest of maximizing the impression of discord and confusion has grouped the different tests used into five or six categories. We follow the many courts and commentators in highlighting the three dominant approaches – but nothing turns on particularities of classification: (1) we do not dispute that there are differing approaches but (2) as we show, no decisional approach – however they are divided or subdivided

(Continued on following page)

Petitioner argues that McNamee's visits to Texas to train Clemens and/or other professional athletes years prior to the statements at issue were sufficiently related to his defamation claims. Under each of the three approaches followed by various courts, though, this argument fails. Notably, Petitioner does not even argue in his brief how any of these tests would affect the outcome of this case.

1. The "Proximate Cause" or "Substantive Relevance" Test

To meet the "proximate cause" test applied by multiple courts, discussed by Petitioner at pp. 11-12, "the defendant's in-state conduct must form an important, or at least material, element of proof' in the plaintiff's case." *Harlow v. Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005) (internal citations omitted).[7] This test has also been referred to as a "substantive relevance" test, which "examines whether any of the defendant's contacts with the forum are relevant to the merits of the plaintiff's claim." *O'Connor v. Sandy*

– would yield a different conclusion here. *See, e.g., Employers Mut. Cas. Co. v. Bartile Roofs, Inc.*, 618 F.3d 1153, 1160-61 (10th Cir. 2010) (identifying three tests); *O'Connor*, 496 F.3d at 318 (same).

[7] The "meaningful link" test the First Circuit applied in *Nowak v. Tak How Invs., Ltd.*, 94 F.3d 708, 716 (1st Cir. 1996), and has not since, was characterized as merely a "slight loosening" of the proximate cause test. *See also O'Connor*, 496 F.3d at 319.

Lane Hotel Co. Ltd., 496 F.3d 312, 319 (3d Cir. 2007) (cited at Pet. 12-13).

There can be no contention here that McNamee's visits to Texas are elements of the defamation claims for statements in New York years later, the merits of which hinge on whether McNamee injected Clemens with illegal substances in Toronto and New York. *See WFAA-TV, Inc. v. McLemore*, 978 S.W.2d 568, 571 (Tex. 1998) ("To maintain a defamation cause of action, the plaintiff must prove that the defendant: (1) published a statement; (2) that was defamatory concerning the plaintiff; (3) while acting with either actual malice, if the plaintiff was a public official or public figure, or negligence, if the plaintiff was a private individual, regarding the truth of the statement.").

2. The "But For" Test

Under the second most permissive standard, the "but for" test, courts have asked whether, "'but for' the contacts between the defendant and the forum state, the cause of action would not have arisen." *Terracom v. Valley National Bank*, 49 F.3d 555, 561 (9th Cir. 1995); *see also Diamond Crystal Brands, Inc. v. Food Movers Int'l. Inc.*, 593 F.3d 1249, 1273 (11th Cir. 2010). The facts in this case do not meet this standard either. McNamee and Clemens met when the Toronto Blue Jays hired him to train Clemens. App. at 78a-79a. McNamee injected Clemens with steroids in Toronto and New York, never in Texas. *Id.*

at 3a. McNamee trained him in cities throughout the United States and Canada – particularly Toronto and New York, after Clemens began to play for the New York Yankees. *Id.* at 79a-81a. McNamee's visits to train Clemens or other athletes in Texas were in no way a but for cause of McNamee's statements in New York that form the basis of Clemens's claim.

3. The "Substantial Connection" Test

The final, most flexible test requires that "the cause of action, of whatever type, have a substantial connection with the defendant's in-state activities." *Bird v. Parsons*, 289 F.3d 865, 875 (6th Cir. 2002). Although flexible, this test still requires that the "operative facts of the controversy" be related to the defendant's contact with the state. *Id.* The cause of action must have been "made possible by" or "lie in the wake" of the forum contacts. *Lanier v. Am. Bd. of Endodontics*, 843 F.2d 901, 909 (6th Cir. 1988), cited in *Air Prods. & Controls, Inc. v. Safetech Int'l, Inc.*, 503 F.3d 544 (6th Cir. 2007).[5] The cases cited by Petitioner do not suggest otherwise.

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[5] Although Petitioner contends circuits other than the Sixth Circuit "have applied" this test, no other circuit currently endorses this test, and the cited cases do not suggest otherwise. Instead, the circuits cited by Petitioner as adopting this test have simply declined to adopt a specific test beyond the words "arises out of or relates to." *See, e.g., Diamond Crystal Brands, Inc.*, 593 F.3d at 1273 (11th Cir. 2010) ("This circuit has not adopted a rigid approach to determining when contacts 'arise

(Continued on following page)

Even under this most permissive standard, petitioner cannot show that his claims "arise out of or relate to" McNamee's Texas contacts. In no way is a defamation claim arising out of statements made in New York, to non-Texas residents, about injecting steroids in Toronto and New York, "made possible" by McNamee's trips to train Clemens at his home over the course of a multi-year relationship centered in Toronto and New York.

Since any circuit split on this issue is irrelevant to *this* case, as the result would be the same under the standards applied by each of the courts of appeals, this case does not present an appropriate vehicle to resolve any differences among those courts. Indeed, if the issue is as frequently recurrent as petitioner claims (Pet. at 18-20), that is reason for denying review here, and adhering to this Court's ordinary practice of deciding issues in cases where they were considered by the court below and are outcome-affecting.

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out of or relate to' a cause of action."); *Chew v. Dietrich*, 143 F.3d 24, 29 (2d Cir. 1998) (declining to adopt a specific test); *Akro Corp. v. Luker*, 45 F.3d 1541, 1547 (Fed. Cir. 1995) (using standards of other circuits as "guideposts"); *City of Virginia Beach v. Roanoke River Basin Ass'n*, 776 F.2d 484, 487 (4th Cir. 1985) (not specifying any standard); *Harrell v. Duke University Health System, Inc.*, C.A. No. 7:07-813-HMH, 2008 WL 80122, at *2 (D.S.C. Jan. 7, 2008) ("the United States Court of Appeals for the Fourth Circuit has not adopted one of the various approaches for making this determination").

III. CERTIORARI IS ALSO INAPPROPRIATE GIVEN THE DISTRICT COURT'S ALTERNATIVE STATE LAW GROUNDS FOR DISMISSAL OF SOME CLAIMS

In addition to dismissing the Complaint on jurisdictional grounds, the district court *also* dismissed some of Petitioner's claims on the basis that, under Texas law, Respondent is absolutely immune for the allegedly defamatory statements.[9] This alternate ground for affirmance makes certiorari particularly inappropriate.

As the district court held, based on well-established Texas law, a witness cannot be prosecuted for statements made during the course of a government investigation. App. at 59a-63a (citing *Shanks v. AlliedSignal, Inc.*, 169 F.3d 988, 991 (5th Cir. 1999)). Here, because McNamee's statements to Senator Mitchell were compelled as part of a governmental investigation (an investigation that has since led to plaintiff's indictment), they are immune from suit.

Because the court of appeals held that the courts in Texas lacked personal jurisdiction over McNamee, it did not reach the question of whether the statements were absolutely immune from suit. If, however, this Court were to reverse the court of appeals and

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[9] The immunity analysis was limited to the claims concerning McNamee's statements to the Mitchell Commission, which are at the heart of the Complaint, and did not apply to the statement to SI.com.

find that there was jurisdiction over McNamee, an alternative state law basis for affirmance would need to be considered. The existence of this question of state law makes the case particularly inapt for certiorari review. *See, e.g.*, *N.C.P. Marketing Grp., Inc. v. BG Star Prods., Inc.*, 129 S. Ct. 1577 (2009) (Statement of Kennedy, J., joined by Breyer, J., respecting denial of certiorari).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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